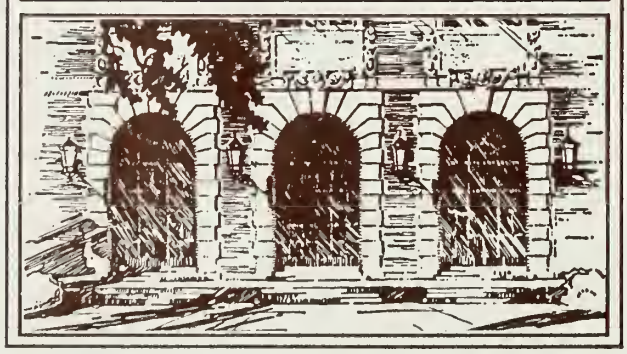
STATE CONSTITUTION REVISION



UNIVERSITY OF ILLINOIS BULLETIN

STATE CONSTITUTION REVISION: THE ILLINOIS OPPORTUNITY

Jefferson B. Fordham
George D. Braden
William N. Cassella, Jr.
Milton L. Rakove

GEORGE A. MILLER LECTURES

Edited by Samuel K. Gove

THE INSTITUTE OF GOVERNMENT *and* PUBLIC AFFAIRS

UNIVERSITY OF ILLINOIS BULLETIN

Published twelve times each month by the University of Illinois. Entered as second-class matter December 11, 1912, at the post office at Urbana, Illinois, under the Act of August 24, 1912. Office of Publication, 114 Altgeld Hall, Urbana, Illinois 61801.

Volume No. 67

April 6, 1970

Number 99

STATE CONSTITUTION REVISION: THE ILLINOIS OPPORTUNITY

Jefferson B. Fordham
George D. Braden
William N. Cassella, Jr.
Milton L. Rakove

GEORGE A. MILLER LECTURES

December 10–11, 1969

Edited by Samuel K. Gove

INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS
UNIVERSITY OF ILLINOIS
FEBRUARY, 1970

FOREWORD

On December 10 and 11, 1969, the George A. Miller Lecture Committee of the University of Illinois at Urbana-Champaign sponsored a two-part lecture-discussion series on problems of state constitutional revision. The timing of the lectures was particularly appropriate because earlier in that week on December 8, the sixth Illinois Constitutional Convention had convened in Springfield.

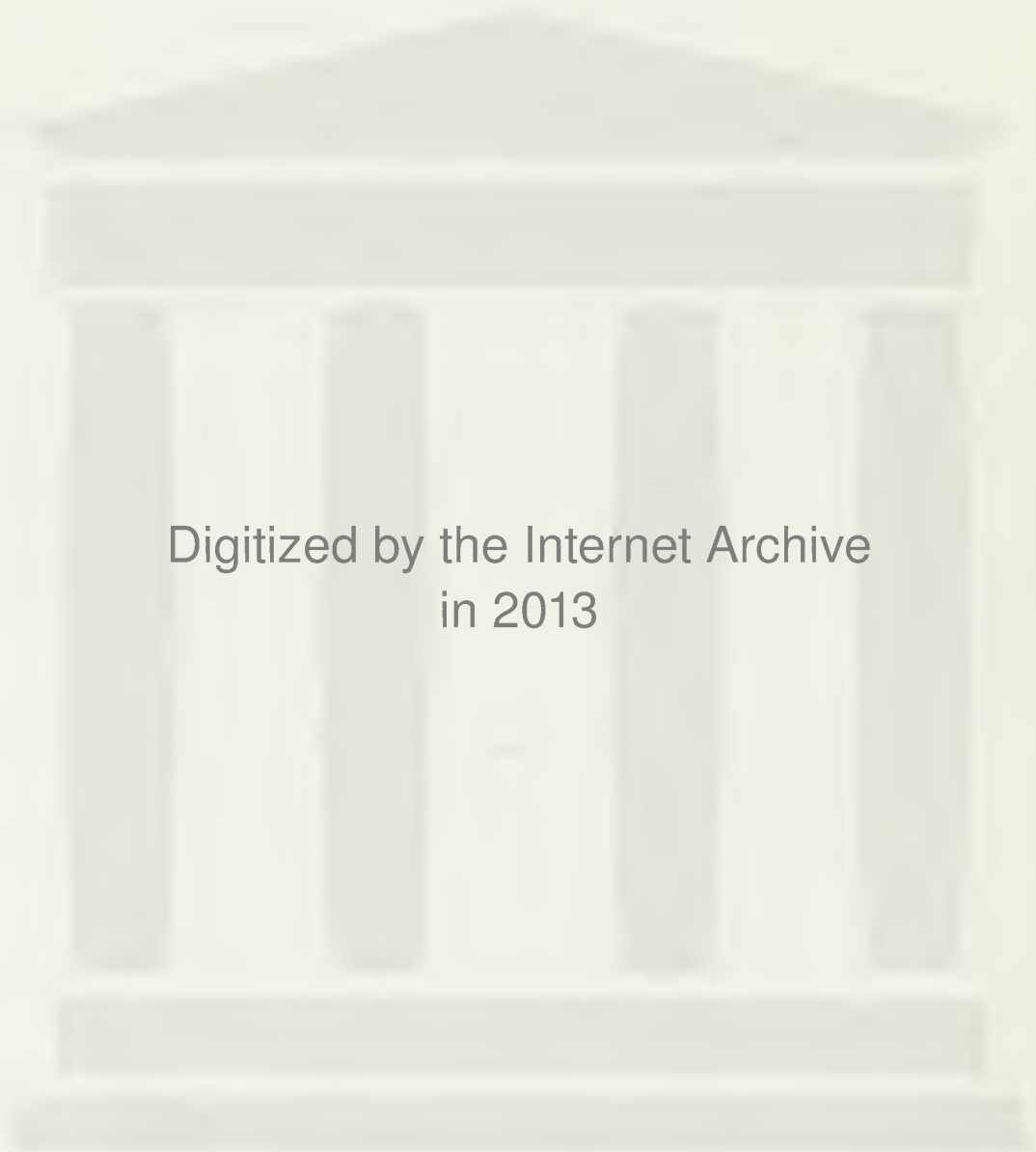
There is much interest in state constitutional change across the country. Many claim that shortcomings in state constitutions have hindered state governments from coping with their many problems, including those associated with our urban crises. Some states have gone, and others are going, the route of Illinois and convening a constitutional convention to provide a complete review of their constitution. Others are using approaches that provide less extensive reviews.

The lecture-discussion series was aimed at putting the Illinois situation in the national context. Some of the discussion was directed specifically toward Illinois problems, while other parts of it looked at the general picture.

The Institute of Government and Public Affairs wishes to thank the speakers for participating in this important series. Also thanks are extended to Dean John Cribbet of the University of Illinois College of Law who presided at the first night's lecture delivered by Jefferson B. Fordham. The undersigned moderated the second night's panel discussion by George D. Braden, William N. Cassella, Jr., and Milton Rakove.

In publishing these lectures, the Institute hopes that it may present some new insights into the problems facing the delegates to the Illinois Constitutional Convention.

Samuel K. Gove
Director



CONTENTS

LECTURE

STATE CONSTITUTIONALISM IN AMERICA

JEFFERSON B. FORDHAM

I congratulate the people of Illinois upon the opportunity their open constitutional convention affords them for achieving a grand design in the state constitutional order. During the century that has passed since Illinois and other states adopted post–Civil War constitutions, experience has confirmed strongly that, to be viable, a state organic law must be broadly conceived and highly flexible. The role of a state constitution is to provide the basic governmental framework and make the distribution of responsibility and authority for decision-making, which will enable the state to deal, not simply with the perceived problems of today, but also with the as yet undisclosed problems of the future. Surely it is not the office of a state constitution to commit the future by hardening particular policy decisions of the present.

It is rather incongruous, as a matter of political theory, to have, as we do, a national constitution, which is brief and largely general in character, and lengthy state constitutions fraught with policy determinations. I say this because the federal government is one of delegated powers, which, of necessity, must be identified in the organic instrument, whereas residual powers abide in the states. You do not have to spell out the powers of a state legislature; it is enough to say in a constitution that the legislative power is vested in the legislative branch. The power of a state legislature is plenary except as restricted by the federal Constitution, the state constitution, and limitations implicit in the federal system.

In my perspective, it would be difficult to exaggerate the importance of the charge of the Illinois Constitutional Convention of 1969. This statement is premised upon the belief that the states — far from finding themselves well along the road to limbo — have and will continue to bear major responsibilities in the total governmental scheme of things.

A few years ago there was much serious talk to the effect that practically all important decision-making in this country, then and thenceforth, was and would be done at the national level. In this view the states and their legislatures were relegated to a subordinate, insignificant level. Things have changed; such talk is seldom heard these days. There is fresh awareness that, in a huge and complex country such as ours, the responsibilities of government have to be distributed among different levels of government if the total job is to be

manageable. I mean by this, of course, something much more substantial than administrative decentralization. I am referring to distribution of responsibility for policy-making. Beyond this, of course, is the store laid in a democratic society by citizen participation. We are engaged right now in carrying this to the subcommunity level in large urban centers.[1]

We have found that decentralization in the governmental scheme as a whole does not erect jurisdictional barriers. In a given problem area governmental units standing in horizontal, as well as vertical, relationships may have interests which bespeak cooperation. Intergovernmental relations are an important factor in responding to problems which do not respect jurisdictional lines.

That the federal government has immense influence over our lives in the spheres both of external affairs and domestic concerns is obvious, but it is no less clear to me that state responsibilities with respect to a congeries of human affairs are of first-rank importance and pervasive influence.

State responsibility for so-called law and order is primary. The principal body of private law is state law. The basic system of criminal justice and law enforcement is the state system. This is emphasized by the Federal Assimilative Crimes Act, through which Congress has borrowed state criminal law for Federal enclaves. It is still true that the responsibility for public education is that of the state. State responsibilities for both utilization and conservation of natural resources are large. Local government is the creature of the state; surely the problems of urban life in this highly urban civilization are of first-rank importance. This is but a start on the list. Local government, in particular, may touch upon the life of the citizen from start to finish. The functions of local units run into the hundreds. To say that these things are relatively inconsequential is to fail to see the woods at all.[2]

What are the basic components of a state constitution? Some years ago in speaking of constitutions more broadly, I said:

A written constitution for a democratic society, which pursues its political ends through representative government, needs but four elements: (1) provision of the basic framework of government; (2) distribution broadly of governmental powers within the designed framework, with secondary power-devolution left to the legislative arm; (3) substantive and procedural guaranties to the individual against the arbitrary exercise of governmental authority — a bill of rights; and (4) provision of machinery for change in the constitution.[3]

I hardly need add that I would apply this to a state constitution.

One is aware, of course, that the way we have been acting over a long period as to state constitutional development tends to condition what we can do; we are somewhat habituated to constitutional specificity, to trying to

[1] See the New York statute with respect to decentralization as to public education in New York City, *New York Laws of 1969,* c. 330.

[2] Jefferson B. Fordham, "The States in the Federal System — Vital Role or Limbo?" *Virginia Law Review* 49(1963): 666, 668.

[3] Jefferson B. Fordham, "The Legal Profession and American Constitutionalism," *The Record of the Association of the Bar of the City of New York* 12 (1957): 518, 519.

perpetuate particular policies by embodying them in state constitutions. I, however, am free to speak with as great detachment as I may choose; and it pleases me to say that any departure, in current state constitutional revision, from the four basic elements mentioned should be grounded upon the most compelling considerations.

I would not suppose, for example, that Reconstruction-Era constitutional provisions on corporations and railroads have any place in the 1970 scheme of things. About all that can be said of them is that they restrict the range of legislative policy-making, thus limiting the freedom of the lawmakers to respond with sensitivity to social need as conditions change.[4]

Human Rights

In 1970 terms, the treatment of human rights in a state constitution is to be undertaken in a very different federal constitutional setting from that of 1870. The pertinent provisions of the Constitution of the United States, as amended, were pretty much the same in 1870 as 1970, with the notable exception of the provisions of the Nineteenth Amendment for woman suffrage, but judicial exegisis during the past sixty years has carried us far.

While the first ten amendments to the federal Constitution, familiarly called the Bill of Rights, were designed as safeguards against action by the national government,[5] the force of nearly all of their safeguards has been rendered effective against state and local governments through interpretation of the due process of law clause of the Fourteenth Amendment. This is true as to substantive matters, such as freedom of speech and assembly, as well as procedural safeguards, such as protection against unreasonable searches and seizures.[6] Whether we explain this on the basis that Fourteenth Amendment due process broadly guarantees fundamental rights as to life, liberty, and property which are more particularly safeguarded against action by the federal government or that Fourteenth Amendment due process incorporates the guaranties of the Bill of Rights, the result, to the extent of the coverage, is the same.

It will be borne in mind that the federal constitutional safeguards of human rights are enforceable in the state, as well as the federal courts, or as Article VI of the federal Constitution lays it down, the state courts are bound by the provisions of that instrument.[7]

---

[4] In the recent revision of the Constitution of Pennsylvania, such provisions were eliminated.

[5] *Barron* v. *Mayor, etc.,* of Baltimore 7 Pat. 243 (1833).

[6] Most recently the Supreme Court has held that the provision of the Fifth Amendment against double jeopardy "represents a fundamental ideal in our constitutional heritage, and it should apply to the States through the Fourteenth Amendment." *Benton* v. *State of Maryland,* 89 S. Ct. 2056, 2062 (1969).

[7] Of course, a state court ruling against constitutionality rested upon an adequate independent state (nonfederal) ground obviates federal court review on federal grounds.

I believe it fair to say that there has been much greater sensitivity to human rights in the federal courts than in the state courts. What has been done under Fourteenth Amendment due process makes this so perspicuous as to render substantial extrapolation a bore. I will add that the courts of the Union — with their greater detachment from the state governmental establishment and interests and their national orientation — were the obvious recourse of the aggrieved citizen.

What the Supreme Court has done with respect to fairness in legislative representation is the most conspicuous example of federal judicial interposition in default of state action, whether by the state legislature or the state courts.[8] One recalls the frustrations of John B. Fergus, who, back in the twenties, tried in vain to get the Illinois courts to act on malapportionment in the legislature. He sought a writ of mandamus to compel the legislature to reapportion.[9] He sought a writ of quo warranto by way of challenge to the very legal standing of a malapportioned legislature.[10] He was much too far ahead of his time and was bounced unceremoniously out of court.

In these circumstances — marked by broad federal protection — why bother with a declaration or bill of rights in a state constitution? There are several things to be said in response to this question:

1. It may be desired to cover in a state instrument more ground than in the federal. A right to collective bargaining in private employment, recognized by the New Jersey Constitution of 1947, is one example.[11] Pennsylvania, by the way, recently adopted a constitutional amendment, which provides for collective bargaining between policemen or firemen and their public employers and for compulsory arbitration in case of an impasse in negotiations.[12] I must say that I am not persuaded of the wisdom of constitutional provisions on employer-employee relations; I prefer to leave the legislature with wider range in policy-making in this field.

There are those who may wish to have a woman's rights provision in a state constitution.

Then, there are the so-called right-to-revolution clauses, which go back to the days of Madison and Jefferson and which are to be found in a number of state constitutions, including the Illinois Constitution of 1870. What they have added has not been altogether clear. It is noteworthy that, in 1966, the Kentucky Court of Appeals relied upon such a clause to uphold resort to a constitutional revision assembly, established by statute, to put forward for

[8] *Reynolds* v. *Sims,* 377 U.S. 533 (1964) and companion cases. For general information, see Robert G. Dixon, Jr., *Democratic Representation* (New York: Oxford University Press, 1968).

[9] *Fergus* v. *Marks,* 321 Ill. 510, 152 N.E. 557 (1926).

[10] *People* ex rel. *Fergus* v. *Blackwell,* 342 Ill. 223, 173 N.E. 750 (1930). See also *Fergus* v. *Kinney,* 331 Ill. 437, 164 N.E. 665 (1929).

[11] *Constitution of New Jersey,* Art. I, Par. 19.

[12] *Constitution of Pennsylvania,* Art. III, Section 31.

electoral approval proposed amendments to or revisions of the state constitution, even though the constitution expressly provided a convention method of revision.[13] The convention method was slow and depended upon electoral approval.[14] The majority opinion exalted the state bill of rights as something supreme and inviolate, while all else was considered transitory and changeable.

Should a state constitution respond expressly to the widely-asserted need of better recourse for the common man against unfairness and abuse of power in public administration? Does the ombudsman idea deserve constitutional recognition?[15] It seems to me that the importance of the subject gives it a claim to consideration in a state constitutional convention. This is not to say that I am fully persuaded. But constitutional status would accord notable recognition to this special officer, which should fortify him in standing up to all and sundry in the administrative establishment.

Should there be express constitutional recognition of so-called welfare rights? In my view, human interests call strongly for action by organized society; but we are dealing here with positive social policy as to distribution or redistribution of goods and services, or the means to acquire them, and I doubt that we could enunciate a viable constitutional principle on the subject. Thus, I do not suggest that a state go beyond an equal rights provision at this time.

2. As a matter of internal completeness and symmetry, an organic instrument for a major political entity, even a unit in a federal system, calls for declared safeguards of human rights, especially in a system in which there were states before there was a federation or union. The tradition involves a commitment of large psychological value, I suggest, and I favor following it, even though provisions of state bills of rights have not always been liberally interpreted in favor of human rights.

3. As to some matters affecting human rights, it might be desired in a particular state to be more restrictive of government than is the federal Bill of Rights. This could be the case as to aspects of separation of church and state and religious liberty. A state could take a position in the declaration of rights which would not allow of shared time, that is, a program in which pupils in church-related schools would get part of their educational experience in classes on secular subjects in public schools. It is my guess that the Supreme Court of the United States would hold, as has the Supreme Court of Illinois,[16] that shared-time programs are constitutional. But such policies do not relieve the pressure; the cost of education has grown so great that the

[13] *Gatewood* v. *Matthews,* 403 S.W. 2d 716 (Kentucky 1966).

[14] *Constitution of Kentucky,* Section 258.

[15] It was first articulated, as a legal matter, in the Swedish Constitution of 1809. The Swedish experience is examined in Walter Gellhorn, *Ombudsman and Others: Citizens' Protectors in Nine Countries* (Cambridge: Harvard University Press, 1966).

[16] *Morton* v. *Board of Education,* 69 Ill. 2d 38 (1966).

push is toward direct public subsidy of church-related schools, which are carrying part of the responsibility for primary and secondary education.[17]

It is noteworthy that a three-judge federal court, by a two-to-one decision, rendered less than two weeks ago, upheld a Pennsylvania statute which provided for state payment — from an earmarked tax on horse racing — of the actual cost of teachers' service, textbooks, and instructional materials in certain secular courses in nonpublic schools.[18] The majority concluded that the purpose and primary effect of the statute was secular in nature and that incidental benefits to sectarian schools were not enough to violate the establishment clause. Chief Judge Hastie, of the United States Court of Appeals for the Third Circuit, the dissenter, saw the arrangement as a subsidy rather than a genuine purchase of educational services and concluded that the state was supporting a religious enterprise of which secular courses were a part. Beyond that, as he saw it, the state was both inviting political activity by religious groups and state intrusion into the affairs of religious institutions. Review by the Supreme Court is being sought. Meanwhile, the Hastie position is sound, in my opinion, and I make bold to predict that it will prevail. Obviously, if it does, Illinois will be bound by it.

Does the establishment clause of the First Amendment proscribe tax exemption of property used for religious purposes? I mean here property used directly for religious activities as distinguished from business or charitable properties of a religious organization. Bear in mind, of course, that the establishment clause, by interpretation of Fourteenth Amendment due process, is a limitation upon state action. There is an historical argument, grounded in general practice from the beginning of the Republic, which substantially supports the exemption. But the evolution of thought in the ongoing business of filling in the content of broad constitutional principles runs the other way. A direct cash subsidy of religion would not stand up. Tax-free provision of governmental services to religion is, in plain economic terms, just as real a subsidy. A test case is pending in the Supreme Court.[19]

Meanwhile, it is clear that exemption is a matter of state choice; a state may tax religious property if it sees fit. With respect to constitutional revision, my suggestion is that a state constitution should permit classification of property for ad valorem tax purposes. This suggestion calls for qualification of the traditional uniformity clause. The policy thrust is along the line that religious property ought to be taxed on a basis that bears some relation to governmental services received, which might well be less burdensome than

[17] See the free school book case, *Board of Education* v. *Allen,* 392 U.S. 236 (1968). (Provides for the loan, mandated by statute, of school books, free of charge to all children in grades seven through twelve upheld as to parochial school pupils.)

[18] *Lemon* v. *Kurtzman,* USDC E. Pa. (38 LW 2329).

[19] *Welz* v. *Tax Commission,* 24 N.Y. 2d 30 (1960); probable jurisdiction noted, 395 U.S. 957 (1969).

taxes on property devoted to other types of uses. Obviously government — the organized public sector — is providing many of the services necessary or desirable to meet human needs, and it is entirely rational to expect payment for what is rendered, apart from welfare considerations and policy.

Equal rights provisions in a state constitution plainly cover some of the same ground as related federal constitutional provisions, such as the equal protection clause of the Fourteenth Amendment. State commitment to equal rights is, nonetheless, of concern to a state constitutional convention. The principle is too important as a matter of the basic integrity of the social order.

In some states, notably Louisiana, it has been a commonplace to engage in a kind of popular legislation by writing a congeries of policy determinations into the constitution by frequent and often detailed amendments. This is a grave offense to my notions of state constitutionalism in general. I make particular reference to it here because I see a kind of parallel in what is taking place today in the federal courts. Reform in the interest of human welfare is being sought vigorously in the judicial forum. I hardly need say that I believe deeply in liberal interpretation of federal and state constitutions in favor of human rights. What concerns me is something that I expect to explore more fully in a separate published paper. I refer to the great pressure for judicial decision at the constitutional level in default of legislative reform at the statutory level. The ardent advocate is a pragmatist; even if the point I am making occurred to him, it is not likely that he would be deterred by it. My point, of course, is that judicial reform at the constitutional level necessarily constricts the range of legislative choice and decision in the ongoing business of policy-making in a changing social condition. It bypasses, moreover, deliberative processes in policy-making.

The Legislature

Central to state constitutional reform is the legislative institution. I have in mind, you can be sure, the lively contemporary interest in one form or another of participatory democracy, but it is evident enough to me that in large community units there is no effective escape from recourse to representative government. Even New England towns have had to acknowledge this. In populous towns, representative town meetings have replaced the traditional town meeting.

The state legislature — a body with plenary powers — should be seen both as a policy-making organ and as a power-distribution or devolution arm of government. This is patently so as to delegation of authority to local government, absent an expansive constitutional grant of home rule. It is, in fact, true as well of structural arrangements and delegation of authority in the state government.

It does not take a numerous body to do a legislative job. The most

populous state, California, has a bicameral legislature of 120 members, and I have heard the chairman of the state's constitutional revision commission proudly proclaim it to be the best of the state legislatures. What is needed is a substantial representative assembly, which is entrusted with responsibility for policy-making unhampered by rigid time or procedural limitations and which has the freedom to mobilize the staff and other resources it takes to do the job well. If we are to confide broad substantive powers to a legislature, we should not hesitate to accord it autonomy as to internal organization and procedure and treat it as a continuing arm of government working regularly in annual sessions not subject to any limitation as to length of session.

It is my notion that the unicameral structure is better designed for responsible action and genuine political accountability. Now that we are guided by the one-man, one-vote principle for both houses of a bicameral legislature, the permissible range of differences in the representative systems for two houses is considerably narrowed. Some differences can be worked into a unicameral system, in any event, as by having the state covered by single-member districts over which is laid a layer of larger regional districts. Such an arrangement would be calculated to afford regional as well as more local perspective.

The unicameral form is simpler, more visible to the citizen. It fixes institutional and political responsibility. It avoids that third-house mechanism, the conference committee. In contrast, an impasse in the two politically-divided chambers in Pennsylvania has the state in a fiscal crisis at this very moment. It is true that a second house may serve as a brake upon hasty, ill-considered action, but the brake might be applied as well to thoroughly-considered reform measures. The unicameral form is calculated to facilitate a more positive, decisive legislative process, while still subject to ultimate political accountability.

I add only that the matter of structure is not of the highest order of importance. Representatives of character and ability can work well in the bicameral framework, given the scope to which I have already referred.

Apart from the bill or declaration of rights, a state constitution should contain a minimum of limitations upon the legislative power or how that power may be exercised. A traditional type of limitation upon the "how" of legislating, as distinguished from substantive jurisdiction, is the constitutional ban upon special or local legislation. Commonly, such provisions have spelled out a whole list of subjects as to which special or local legislation is proscribed and have ended with a catch-all clause. I would eschew such listing and simply articulate a general prohibition. Local legislation is, of course, one type of special legislation — in practical terms, the most important part of the problem area. It is appropriate to deal with that type in the state constitutional article on local government.

It may be desired to direct a few constitutional mandates to the legisla-

ture. The Illinois Constitution of 1870 ordains that the legislature shall provide a thorough and efficient system of free schools. This establishes the basic policy for the state. Why say more in the organic law?

If legislative redistricting and reapportionment are to be left to the legislature, there should be a constitutional command that the legislature act. I suggest, however, that it would be better to establish intelligible constitutional policies as to redistricting and reapportionment and place their execution in nonlegislative hands. There is an inescapable element of conflict of interest in legislative performance of the function.

I anticipate that there will be laid before the Illinois Constitutional Convention proposals for the initiative and referendum. Recent experience affords no basis for expecting them to originate in civil rights circles. Certainly, not if California's initiated anti–fair-housing constitutional amendment, Proposition XIV,[20] or Akron's compulsory referendum on fair housing measures[21] are any indication. Over time, however, this could be a passing matter; at a later juncture, it might be human rights forces seeking to get adoption by initiative of the policy they espouse. I say "it might," but who knows, for are we not talking about the "great silent majority"?

One recognizes that the initiative affords a means of bringing into decision-focus policy ideas to which a legislature appears insensitive. Likewise, the referendum, as available independently of the initiative, is a means of rejecting a legislative policy determination that does not have sustaining popular support. But neither affords any institutionalized means of gathering facts and opinions, deliberation, and debate. Thus, the indirect initiative, which affords opportunity for legislative consideration, has some appeal.

The Executive

There is a widely-held opinion among students of state government that there should be centralized responsibility and accountability in the executive branch. I embrace this view. It exacts a short ballot calling for the election of a governor and lieutenant governor. It allows, in addition, for an official charged with post-audit, who might be chosen either by popular election or by the legislature.

The logic of this view is that the department heads should be appointed by the governor, without any requirement of advice and consent by a legislative body, and should be removable by him. The advice and consent qualification of executive authority exacts a large price in restriction of executive freedom of action in order to assure some check on unwise appointments.

A limitation upon the successive terms that one may serve as governor

[20] Held invalid in *Reitman* v. *Malkey,* 387 U.S. 369 (1967).
[21] Held invalid in *Hunter* v. *Erickson,* 89 S. Ct. 557 (1969).

is a declaration of distrust of the democratic process and a built-in scheme for lame-duck leadership. I do not recommend it.

In fiscal matters, planning and execution of both capital and operating budgets are executive functions and include the responsible estimate of revenues against which appropriations are made. On the appropriation side, a governor needs the leverage of the item veto, not just the power to reject an item outright but authority, as well, to reduce it. This power is particularly important under a system of lump-sum or performance budgeting, as distinguished from the old line-item type, since a veto of a lump-sum appropriation for a department or a program would leave no provision for the purpose and would entail further legislative consideration regardless of the timing.

The Judiciary

Illinois achieved judicial reform in 1962 by constitutional amendment. This development was notable; there was brought into being a simple, three-level system of constitutional courts, with centralized administrative authority in the state supreme court. The reform is widely regarded in legal circles as very advanced and constructive. I do not suggest that the amendment is beyond review in the Illinois Convention; some changes may be proposed. But in my overview of constitutional revision, I regard the judicial posture in Illinois to be so well-considered that I am refraining from talking about the judicial branch.

Finance

Since a state legislature has the nonfederal residuum of legislative power in our system, its taxing power, absent express limitations, is sweeping. Why impose limitations? I do not know.

Taxation is not simply a means of raising funds for the support of government. It serves, at the same time, to distribute the burden. More than that, taxation and appropriation together perform a function of redistributing economic substance to advance the objects of public policy. In the light of all this and in the face of critical need of public revenue for education and whatnot, the case for unfettered legislative power with respect to taxation is a strong one. I have a notion that, before long, federal leverage may be applied to influence state tax policy and that it may be toward an income tax keyed to the federal levy. If Congress is to begin sharing revenues with the states and the local units, it would be rational to move toward coordination of tax policy.

So long as local government is dependent, in large part, upon ad valorem property taxation, a constitutional requirement as to uniformity in assessment and levy is in order, subject to such degree of legislative classification as may well be desired. I certainly would not recommend a uniformity clause applicable to all forms of taxation. I can testify that such a clause

has been an instrument of regression in Pennsylvania and an obstacle to the raising of adequate public revenue.

I would abandon constitutional debt limitations for state and local government. Let the legislature bear the responsibility for the needed prudence exercised by adoption of statutory policies and by subsequent legislative oversight.

There are to be found in a number of state constitutions provisions dedicating particular revenues to particular purposes. Especially noteworthy, at this time, are constitutional dedications of gasoline and motor vehicle license tax revenues to highway — and, in some instances, airport — purposes. Simply from the standpoint of fiscal decision-making, such a commitment denies the legislature the discretion to allocate revenues both with a broad overview and with sensitivity to developing needs. It is extremely bad constitutionalism; it is, moreover, a conspicuously objectionable example of dedication. It favors the private automobile willy-nilly with all the enormous public outlay it takes for operating surfaces for motor vehicles and all the ecological and other problems generated in the use of trucks and automobiles. It seems plain enough that public revenue should be left open to appropriation by the legislature to serve the public interest, broadly perceived, to the best advantage. Highways are but one component of the social circulatory system; other elements, such as mass transit, must be considered in the planning and achieving of a sound, balanced system.

The Suffrage

I imagine that the Illinois Convention's most lively concern with respect to the suffrage will relate to the voting age. The question of whether the age should be lowered is a serious one. This is a new era. Young people, many of whom are under twenty-one, the traditional age of majority, are exerting an active voice in a great range of public issues at all levels of community. And, of course, young males under twenty-one, in large numbers, have been in active military service.

Speaking generally, I have a notion that state reduction of the voting age will be gaining in acceptance in the years ahead. Meanwhile, I am not convinced that it will be wise.

The contention that a person who is old enough to be required to serve in the military forces is old enough to vote is something short of compelling. Of course, males in their late teens provide a pool of persons generally qualified physically and mentally for military duty. Experience validates this. Their capacity to bear political responsibilities is hardly to be determined by the same standards. Justice Holmes said that the life of the law is experience. He might have said with equal force that it is experience which enables the individual to achieve maturity as a social being. I do not recall

having seen an infant prodigy in the social sciences. Experience and maturation vary with the individual, but, in general terms, it cannot be said that an eighteen-year-old — who may still be in high school, who in many states at least cannot even make an irrevocable contract, and who is not ready to bear adult economic and social responsibilities — is yet mature enough to vote.

The more weighty consideration on the side of a lower voting age is the demonstrated concern and involvement of youth in this troubled period. They are better informed about public affairs than earlier student generations, and they are participating in the actions and passions of their times in ways other than voting. I grant that these things are not to be taken lightly.

Local Government

Let me conclude with but a brief reference to my area of special concern as a student of law and public affairs — local government. I defer to others, yet to speak under these auspices, for treatment which is adequate in reach and depth.

I do commend for constitutional articulation a broad grant of home rule powers to counties and to cities of substantial population. My approach to home rule is to give the affected local units, those which adopt home rule charters, the full sweep of authority a state legislature might devolve upon them, subject to the overriding authority of the legislature to be exercised by general law. Constitutional provision for a real and regional governmental jurisdiction and arrangements for intergovernmental cooperation are desirable to afford maximum flexibility in fitting responsibility to changing community configurations and needs. My views on home rule are articulated more fully in the *Model Constitutional Provisions for Municipal Home Rule,* put forward by the American Municipal Association some years ago.

In this area of concern I renew the suggestion, of general application, that the dynamics of our society urgently call for organic political instruments that afford great flexibility in policy development and execution.

PANEL DISCUSSION

THE 1870 ILLINOIS CONSTITUTION DISSECTED

GEORGE D. BRADEN

My assignment for this part of the panel discussion is to tell you what I found upon dissection of the present Illinois Constitution. I must first enter two caveats to what follows. First, I did not in fact dissect all of the Illinois Constitution. My coauthor, Professor Rubin G. Cohn, dissected the bill of rights, the judicial article, and the revenue article. Second, I cannot tell you in fifteen or twenty minutes all that I found. For the complete autopsy, I must refer you to our analysis.[22]

Upon dissection of the Illinois Constitution I found a mess. It must be conceded, of course, that once I have said that the Illinois Constitution is a mess, I have made a value judgment. Unless, that is, I mean that the Constitution is incomprehensible and unreadable. Except for that drafting monstrosity, Section 34, Article IV, "Special Laws for City of Chicago," this is not the case. What then is the value structure that I use in asserting that the Illinois Constitution is a mess? I would argue that a state constitution is a mess if (1) it unnecessarily and improperly limits the government; (2) it contains statutory material; and (3) it unnecessarily freezes the structure of local government. I hasten to point out that two of my three value judgments have subsidiary values — *unnecessarily* and *improperly* — expressed, and thus we are off and running on a mighty slippery road. But since, for the moment, I am in the groves of academe, and logical positivism is dead anyway — or is not "in" these days — I assume we can all slip and slide along together.

Now, in what way does the Illinois Constitution improperly or unnecessarily limit the government? First, and foremost, there are improper fiscal limitations on the government. There are absolute limitations on the incurring of local debt and conditional limitations on the incurring of state debt. In 1870 in Illinois, there was undoubtedly a felt need for these restrictions because of the internal improvement scandals of the preceding two or three generations. Today, these restrictions are not only unnecessary, they are actually counterproductive, to use one of the newer bits of bureaucratese. The fact is that the limitations do not prevent the incurring of debt; they simply

[22] George D. Braden and Rubin G. Cohn, *The Illinois Constitution: An Annotated and Comparative Analysis* (Urbana: Institute of Government and Public Affairs, University of Illinois, 1969).

force the use of devices that are either expensive or inefficient, or both. On the state level, authorities proliferate. They borrow money to build buildings, toll roads, recreational facilities, and the like. These authorities do not enjoy the credit rating of the state, and the result is that they have to pay a higher rate of interest than the state would have to pay on full faith and credit bonds. On the local level, special districts, each with borrowing power, proliferate and jobs proliferate. This is both inefficient and expensive.

The other type of fiscal limitation is in the taxing power. Here, I am tempted to say, after the tenth reading of the tax sections of the Illinois Constitution, "it's spinach, and the hell with it." My best guess is that the 1870 drafters really were not trying to impose improper limitations on the government. I suspect that they were trying to do two things: assure fairness in taxation and cure some procedural abuses that had crept into the system. The latter is more legislative than constitutional and it became an improper limitation only because it is so difficult to amend the Constitution. (Let me note, parenthetically, that I am referring not to the specific difficulty of obtaining the vote of a majority of those voting in a general election or two-thirds of those voting on an amendment, but to the difficulty of getting the legislature or the public interested in technical amendments to technical constitutional provisions.)

As to fairness in taxation, the 1870 drafters used such words as a "tax in proportion to the value" of property, and, as to franchise and privilege taxes, "uniform as to the class upon which it operates." This was all right then, for they were thinking of the types of tax with which they were familiar. Unfortunately, they were too specific, for clever lawyers and judges, clever or not so clever, carried the words over to other taxes and created unnecessary limitations which the drafters probably had not envisioned. The recent Illinois supreme court opinion upholding the income tax, is, I might say with my tongue just barely touching my cheek, a brilliant example of strict construction of the Constitution. The justices have, in effect, gone back to the beginning and read the language in accordance with the true principles that guided the 1870 drafters.[23] Of course, the Convention could go the supreme court one better and simply drop all reference to state taxing power and rely on the courts to use the due process clause to preserve fairness in taxation. That, however, is not the type of convention action that some are worried about.

The other major type of improper limitation on government is by way of excessive control over the legislative process. The debates of the 1870 Convention reveal a great distrust of the legislature. In general, the delegates believed that the legislature was corrupt in several respects. It feathered its own nest and that of local officials; and it granted special privileges and

[23] *Thorpe et al.* v. *Mahin,* 43 Ill. 2nd 36, 250 N.E. 2d 633 (1969).

immunities. Out of this generally held opinion came several restrictions. There was the extensive prohibition on special legislation, principally embodied in Section 22 of Article IV, but sprinkled also here and there throughout the Constitution. There were various attempts to assure honesty and integrity, such as the oath required of legislators, prohibitions on dual-office holding, conflict of interest provisions, restrictions on compensation via the fee system, and even some general restrictions that do not appear on their face to be related to the integrity of the legislative process.[24]

Finally, there were several restrictions added to the rules for the enactment of legislation. These include the bill-reading requirement, the limiting of a bill to a single subject, the prohibition on revision or amendment by reference, and some of the restrictions on the appropriations process. These are all examples of naive do-gooders trying to prevent legislative skullduggery. It is my *guess* that none of these restrictions ever prevented any skullduggery. I *know* that they provided lawyers with lovely devices for attacking legislation and that, over the years, the courts aided and abetted lawyers in what I call an irrelevant exercise in limiting government. It is irrelevant because the person attacking the legislation couldn't care less about the legislative process — he simply does not like the substance of the legislation.

In all fairness to the 1870 drafters, I should note that most of these restrictions on the legislative process produce a judicially enforceable limitation on government only if the courts follow the "journal entry rule." Under this rule, the courts will examine the legislative journals to see if the constitutional procedure has been followed. Under what is called the "enrolled bill rule," the legislature alone enforces the rule, for the courts accept as conclusive a certification by the proper legislative officers that a bill was duly passed. I am not sure that the Illinois courts had decided prior to 1870 which rule they would follow. I strongly suspect that the 1870 delegates would have opted for the journal entry rule, so strong was their disapproval of the legislature. In any event, the Illinois courts have followed that rule. I should also note that the most mischievous of these restrictions are the one subject to a bill requirement and the amendment by reference prohibition, and both of them are operative without reference to the legislative journals.

My second characterization of a constitutional mess, the one without a subsidiary value judgment, is the inclusion of statutory material. Need I say more? Well, yes, I think I should note that there are two types of statutory material — that which everybody concedes is statutory and that which is statutory because one thinks that it is really not appropriate to limit the government in this way. (Thus, another subsidiary value judgment has

[24] For examples of general restrictions, see Braden and Cohn, *op. cit.*, pp. 226–27, 454–55, and 457.

crept in.) The first type is exemplified by Article XIII on warehouses. Even the 1870 delegates themselves recognized this.

> Just before the Committee rose, a delegate offered an additional section, as follows: "This act shall be deemed a public act and shall be in force from and after its passage." (Debates 1627.)
>
> The proposal was voted down. As the convention proper was subsequently about to refer the Warehouse Article to the Committee on Revision and Adjustment, another delegate offered an additional section, reading: "Be it enacted by the people of the State of Illinois, in Convention assembled." The proposal was ruled out of order.[25]

The second type is exemplified by most of the sections in Article XI on corporations. I personally do not think that the legislature should be prohibited from allowing noncumulative voting for corporate directors, or creating a state bank, or allowing less than double liability for bank stockholders, or requiring banks to publish only annual statements, and so on. Nor, for that matter, do I think there is any need to prohibit lotteries or the employment of convict labor in a constitution. Thus, at some point a limitation on government becomes "statutory" only because in someone's judgment it ought not be a constitutional limitation at all, which is to say that the matter ought to be left to the legislature. The Illinois Constitution has several provisions that approach the true statute, several that are sort of in the middle, and several, such as those on lotteries and convict labor, that are "statutory" by subjective fiat.

My third characterization of a constitutional mess is the unnecessary freezing of the structure of local government. I do not propose at this point to enter into an extensive discussion of home rule. The essence of the home rule debate turns on whether or not local units should have a constitutionally protected power to set up their own forms of government. In the absence of a home rule provision, the legislature can provide for complete home rule or limited home rule, or, in the absence of a prohibition of local legislation, it can theoretically deny any home rule. I wish simply to note that, except for the geography of counties and the choice of having or not having township government, the structure of county government is fairly well frozen in the 1870 Constitution. Obviously, the structure of the state government, within fairly narrow limits, must be frozen. In the case of local governments, I see no good reason for freezing the structure. The key issue to be decided is who *controls* structure — the state or the people of the local units, or both in some combination. The extent to which home rule ought to be constitutionally guaranteed is debatable, and reasonable people can disagree on that extent. My point about a mess is that, under the existing Constitution, no one except the people of the whole state by constitutional amendment

[25] Braden and Cohn, *op. cit.*, p. 555.

or convention can do much about county government. Without passing judgment on the vision of the delegates to the 1870 Convention, I would say the result has been a mess.

Having covered my three elements of messiness, I should stop. But, I would not want to leave the impression that I think everything else in the Constitution is "hunky dory." Since I am a student and not a practitioner of government, I am naturally "gung-ho" for the short ballot — the shorter the better — for statewide executive officers. Indeed, for years I had been touting the Connecticut Constitution as the best in the country, but last July "Mr. State Constitution," that is, John Bebout, turned on me and muttered that Connecticut still had a long ballot including, particularly, an elected comptroller with pre-audit powers. I now bow to John and *his* favorite constitution — New Jersey's — for which, as a matter of fact, he personally can take a great deal of credit.

It seems appropriate, also, to note that, by virtue of the adoption of a new article in 1962, Illinois has just the opposite of a mess insofar as the judicial system is concerned. Nevertheless, since I have carefully pointed out the value judgments involved in passing on the merits of a constitution, I must note that I do not favor the election of judges, particularly by partisan elections.

Finally, I must concede that in characterizing various constitutional provisions as "bad" and in setting forth what I think is "good," I am exercising a freedom that delegates to a constitutional convention do not possess. Constitution-making is part of the process of government, and government is the art of the possible. For a variety of reasons, it is not possible to change everything for the good, to say nothing of the best. It is possible, however, for the 1970 Convention to propose a constitution that will be accepted by the people and that, when next dissected, will surely not be called a "mess."

STATE CONSTITUTIONAL REFORM: TRENDS AND COUNTERTRENDS

WILLIAM N. CASSELLA, JR.

"Removing specific constitutional obstacles to state action" was cited by the recent American Assembly on "The States and the Urban Crisis" as the primary objective of constitutional reform today. This purpose is very different, indeed, from that which motivated most state constitutional reformers during the greater part of our history. Their goal more often than not was to place restriction on action by agencies of state government.

In 1776 the Continental Congress urged each colony to adopt a constitution where there was "no government sufficient to the exigency of their affairs." Whether framed and proclaimed by Revolutionary conventions or Colonial legislatures, the peculiar circumstances of the American Revolution were responsible for the negative preoccupation reflected in the original constitutions. This point was emphasized in an early twentieth century appraisal which said:

> . . . American state government, in its essential principles, was not originally designed for efficient, constructive public work, but was the product of temporary and peculiar conditions growing out of revolt against Great Britain. In their natural antipathy to leadership by a royal agent, the revolutionists rejected leadership altogether. In their fear of the British crown and the royal governor, they came to fear all power, even if exercised by their own agents. Instead of making the executive authority responsible, therefore, they shackled it. Knowing that royal agents could not be entrusted with authority, they came to the conclusion that no one could be entrusted with authority. Their ideal of government was a negative one and in seeking after a government powerless to do harm they set up one weak in power for good. This principle of negation, of preventing evil by dividing the powers of government into numerous parts is the chief source of the wastefulness, irresponsibility, and inefficiency which characterize the present system of government.[26]

The division of powers was professed in virtually all original state constitutions, but with few exceptions in practice they followed a system of near legislative supremacy. The pre-Revolutionary legislatures had been seen as the people's bulwark against royal and proprietary tyranny and thus retained an undue share of popular confidence as the first constitutions were framed.

As the original draftsmen of state charters concentrated their fire on

[26] *The Constitution and Government of the State of New York: An Appraisal,* transmitted to the New York State Constitutional Convention by the New York State Constitutional Convention Commission (Albany: Bureau of Municipal Research, 1915), p. 2.

executive tyranny, the first wave of reform was an attack on legislative supremacy. Jefferson was a most articulate spokesman of that point of view.

> All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating of these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots i.e., legislators would surely be as oppressive as one.[27]

Jefferson became the first serious advocate of constitutional reform when he drafted a model constitution for Virginia in 1783. His draft stressed broadening the electorate and an effective division of powers — the two tenets of positive reform — but his recommendations were unheeded and the original constitution endured until 1830.

The strain upon state governments in wartime, the interstate bickering during the period of the Confederation, and the ineffectiveness of legislatures in dealing with state problems caused a rapid decline in public confidence in the legislature as the supreme instrument of state government. Individual legislators as the determined representatives of local or private interests against dominent colonial executives had served a most useful role. However, this extreme localism continued when the executive was all but nonexistent. The result was a neglect of the general interests of the state. Logrolling for local favors and legislating for private benefit of land speculators were common. Taxation was highly discriminatory and the public credit was extended for speculative purposes.

The Executive Veto

Reaction against the abuses of legislative supremacy was generally in the form of restricting legislative power. Suggestions that this be done by a more effective system of checks and balances met with but limited enthusiasm. In New York there had been a popularly elected governor since the time of independence. However, his powers were diluted by a council of appointments, which shared the appointing power, and a council of revision, which shared the veto power.

Massachusetts governors from the start had the veto which could be overridden by a two-thirds vote of the legislature. Gradually, as other original states made their governors popularly elected and new states were admitted, the executive veto was adopted primarily as a negative device to check the legislature rather than as a positive instrument to strengthen the hand of the governor.

Limiting Legislative Powers

Although state constitutional reform efforts were mainly focused upon

[27] Thomas Jefferson, *Notes on the State of Virginia,* edited by William Peden (Chapel Hill: University of North Carolina Press, 1955), p. 120.

preventing the abuses of legislative power, they were also motivated by a general distrust of government. Indeed, practices of the late eighteenth and early nineteenth centuries were so blatantly corrupt that the demand for restraint is certainly understandable.

> With the gradual decline . . . in the prestige of state legislatures, the constitutional limitation[s] upon their powers were steadily increased. . . . The record of legislative folly and corruption in the American states is spread upon their constitutions in the form of a stream of amendments designed to check the abuse of legislative powers. The power to pass special and local acts, the power to tax and to grant tax exemptions, the power to invest the public money, loan the public credit, and dispose of the public resources in general, all were subjected to a series of restrictions ever increasing in number and stringency.[28]

The outrageous discrimination in the granting of early nineteenth century bank charters by the New York legislature was the cause of increasingly rigid constitutional limitations. First in the Constitution of 1821 an extraordinary majority in each house was required to grant a charter, but one commentator relates: "The only effect of the restrictive clause in the constitution has been to increase the evil by rendering necessary a more extensive system of corruption. . . ."[29]

The obvious next step came in the 1846 Constitution, which prohibited outright the granting of special charters and the requirement that corporations and associations must be formed under general law. For every abuse, the remedy seemed to be a constitutional restriction or prohibition.

Procedural Limitations

Reformers were not content to restrict the substantive powers of the legislature; they also injected procedural limitations which were motivated by the feeling that the less time the legislature was in session the less harm it would do. They tried to give a positive twist to the argument, for example, "With less frequent legislative sessions, the more important matters will occupy the attention of the legislators, and individual members will recognize the futility of advancing pet schemes of a merely personal or local interest."[30]

The original almost universal practice of holding annual sessions was replaced by constitutional provisions permitting only biennial regular sessions frequently limited to a specific number of days.

This development illustrates how yesterday's reforms have become the target of today's reformers who are advocating unlimited annual sessions.

---

[28] Arthur N. Holcombe, *State Government in the United States* (New York: The Macmillan Company, 1916), p. 119.

[29] Jabez D. Hammond, *History of Political Parties in New York* (Syracuse: Hall, Mills and Co., 1852), Vol. I, p. 337.

[30] Paul S. Reinsch, *American Legislatures and Legislative Methods* (New York: The Century Co., 1913), p. 132.

A Popularly Elected Governor, but a Plural Executive

The ambivalence of reformers has been particularly apparent in the constitutional role of the executive. A rational method of checking legislative supremacy would be to strengthen the executive. To an extent, the adoption of the executive veto with the requirement of extraordinary legislative majorities to set it aside strengthened the executive's position. Certainly, the most significant reform during the nineteenth century was making the governor popularly elected. Popular election was provided in only 5 of the original 13 states. In the others he was chosen by the legislature. But popular control of the executive went much further. Indeed, the plural executive in fact was the result, with a total of 435 executive officers — by the most recent count — elected in the 50 states, or an average of 8.8 per state.

The evolution of reform dogma on executive selection can be illustrated by successive constitutional changes made in New York. In its first constitution, only the governor was popularly elected, with his appointing powers shared with a council of appointment composed of four senators. This was originally proposed by John Jay, who considered the council as a device for approving or rejecting gubernatorial appointments. Legislators did not see it that way. The legislative members individually were to have equal status with the governor and thus be in a position to dictate appointments. This thinly veiled mechanism of legislative domination was replaced in the Constitution of 1821 by straight legislative appointment, which in turn was shortly subjected to bitter attack. It was contended that the "bosses" known as the "Albany Regency" had "practically taken out of the hands of the legislature and the governor the selection of high public officers. . . ."[31]

Control of patronage by this "invisible" government led to demands for a new constitution in 1846.

> It was the clamor for the abolition of the Albany Regency and the widespread agitation against official despotism of European monarchs which reached our shores that the convention of 1846 made the secretary of state, comptroller, treasurer, attorney general, state engineer, and the judges elective by popular vote. The one was aimed at the abuse of legislative power, the other aimed at the abuse of executive power. Both sought to accomplish their ends by giving to the electorate a larger share of power.[32]

This position came under vigorous attack almost seventy years later as New York prepared for its 1915 Constitutional Convention:

> It is true, the proceedings of the convention of 1846 record a demand that these high officers be made responsible to the people by the establishment of popular election, but it is likewise true that abolition of certain evils was uppermost in the minds of the delegates. They evidently assumed that by transferring the right of election from the legislature to the people the irresponsible and unofficial boss system, which had hitherto controlled the choice in fact, would disappear, on the

[31] New York State Constitutional Convention Commission, *op. cit.*, p. 30.
[32] *Ibid.*

general theory that leadership is not essential to intelligent operations in such matters. That which was a historical accident then became a dogma, namely, that all high officers, no matter what their duties, must on democratic principles, be elected by popular vote. And the theory has been carried to such a great length that a governor of a western state solemnly declared not long ago that the appointment of the state veterinarian by the chief executive savored of monarchy.[33]

A proposal to shorten the ballot won approval in the 1915 Convention but was rejected by the voters. Ten years later, following the recommendation of a special commission headed by former Governor Charles Evans Hughes and supported by the then Governor Alfred E. Smith, the secretary of state, treasurer, and state engineer were made appointive, leaving only the attorney general and the controller, as well as the governor and lieutenant governor, elected. Proposals in the 1938 and 1967 Constitutional Conventions to take these two officers off the ballot met with little support. Actually, New York has gone further than most states in reversing the nineteenth century "reform" which had so drastically lengthened the ballot.

Three constitutions adopted since World War II are the "short ballot" models. The only state executive officer elected in New Jersey is the governor; in Alaska, the governor and the secretary of state, who is the constitutional stand-in for the governor; in Hawaii, the governor and the lieutenant governor.

An Elected Judiciary

Popular election was also the nineteenth century reform prescription for judicial selection. It was in keeping with the prevailing view that the judiciary, as well as the legislative and executive branches, should be accountable to the people. No doubt popular election was an improvement over the original practice of a judiciary chosen by and therefore dependent upon the legislature. However, unlike legislative or executive elections, the election of judges has seldom evoked significant popular interest and has generally been characterized by voter indifference which has permitted almost complete partisan domination of the judiciary in many states.

Twentieth century judicial reform has called for an appointed judiciary. Most reform proposals have been variations of the Missouri Plan, which provides for gubernatorial appointment from nominations made by a nonpartisan selection commission composed of laymen and lawyers. Upon the expiration of his first term, the judge then runs for election without opposition, providing the electorate with an opportunity to remove him. It is said that he runs against his record rather than against a political opponent. The American Judicature Society and the American Bar Association have strongly advocated this method of judicial selection and it is gaining acceptance.

[33] *Ibid.*, p. 31.

Direct Legislation and the Recall

The early twentieth century reforms which most explicitly expressed dissatisfaction with the operation of representative government at the state level were the initiative and referendum first adopted in South Dakota in 1898 and now included in the constitutions of twenty-three states.

The advocates of these reforms were careful to assert, as did Charles A. Beard in 1912, that "it is the practice of representative government as it now prevails in the United States, rather than its theory" which should be considered when the initiative and referendum are appraised.[34]

The third member of this popular reform triumvirate was the recall of elected officers in a special election initiated by popular petition, but it has gained considerably less acceptance.

Broadening the Franchise

Although for more than 150 years the thrust of most state constitutional reform has been to prevent or correct some abuse, the positive rationale was almost always expressed in terms of making government truly responsible to the electorate. Thus reformers have justified popular election of a whole retinue of executive officers, the major and minor judiciary, direct legislation, and popular recall of unpopular officials. The emphasis upon the role of the electorate did come at a time when the franchise was being greatly broadened. Indeed, this was the most significant series of constitutional reforms which extended from the time of independence into the twentieth century with the gradual elimination of property qualifications and restriction because of sex or color.

Urban-Rural Conflict and Home Rule

Since 1850, intense urban-rural conflict has been a fact of life in the American states. One reform which grew directly out of this conflict was constitutional home rule. The cities, particularly the larger ones, resented domination by rurally controlled legislatures. Prohibition of local legislation was the first constitutional measure to prevent some of the more blatant abuses such as "ripper" bills which abolished exsisting local governments for purely partisan purposes. However, the more drastic reform was to give municipalities substantial control of their own "property affairs and government." The first constitutional home rule provision was included in the Missouri Constitution of 1875 and applicable only to the city of St. Louis. Shortly, this became standard reform dogma and has been adopted in various forms in well over half the states. Like so many reform measures, it has had consequences unforeseen by its originators and is presently in the

[34] Charles A. Beard and Birl E. Shulta, *Documents on the Statewide Initiative, Referendum, and Recall* (New York: The Macmillan Company, 1912), p. 33.

process of reappraisal as new patterns of intergovernmental relations are emerging.

Frequency of Change

The foregoing panorama of state constitutional reform only shows the more conspicuous objects in a very detailed and complicated picture. In fact, it is more ambitious than wise for one to attempt such a portrayal, but any consideration of future reform needs to be placed in the perspective of almost two centuries of constitution-making, an art which generally has not improved with age. The reformers of each generation have contributed to the ever growing corpus of state constitutional law the legal prescriptions to right the wrongs of their predecessors and prevent transgressions by their successors. Jefferson thought that governments tend to grow away from the needs and wishes of the people and therefore advocated frequent revision of constitutions. He was the originator of the provision which at regular intervals automatically submits to the voters the question of calling a constitutional convention. This provision now exists in eleven states.

During the nineteenth century there was a much greater willingness on the part of the states to call conventions and adopt the new documents proposed by them. The results showed marked similarities to the reconstruction of eighteenth century houses in the Victorian era. Simple, classic lines were obscured by the addition of elaborate adornments — heavy cornices, gables, cupolas, and so on.

It is significant that the 1965 Connecticut Constitution is very similar in form and substance to its 1818 predecessor and is one of the shortest in the nation. The Connecticut Constitution, in both the old and the new version, is distinguished for the fact that it has avoided adding various new provisions which to many seemed meritorious at the moment but which in time have proved otherwise. Actually, the most unfortunate aspect of constitutional revision experience has been the willingness to add new provisions and the unwillingness to remove outdated sections. Many of the latter were adopted as important reforms to meet problems of another generation. Frequently, some special interest for good or ill has developed a special attachment to these provisions, making it extremely difficult to remove them even though now they may obstruct the operation of the state in meeting current problems. It is problems of this sort that require the most careful scrutiny of those who have revision responsibilities.

An illustration of the problem is provided by the prohibitions against gifts or loans to private persons or corporations by the state or its subdivisions in the New York Constitution (Article VII, Section 8, and Article VIII, Section 1). The prohibitions were inserted in the last half of the nineteenth century to guard against overexpansion of public credit for railroad develop-

ment, especially subsidies by local governments to promote the building of spur lines, many of which were never warranted by economic considerations. Now these provisions present a very real problem as the state endeavors to cooperate with the private sector to continue faltering rail passenger service, particularly within the greater New York region. The legal restrictions have necessitated the outright purchase of the Long Island Railroad by the state and a long-term lease arrangement with the Penn Central for improvement of the New Haven line.

Protection Dies Hard

Among perennial opponents of constitutional reform are the elected local officers who are named in constitutions: assessors, attorneys, auditors, clerks, commissioners, constables, coroners, elisors, public weighers, jailors, marshals, ordinaries, superintendents of the poor, rangers, recorders, registers of deeds, registrars of voters, registers of wills, road commissioners, sheriffs, surveyors, tax collectors, and treasurers. It is understandable that they oppose giving up this protection, which found its way into constitutions as part of the early and mid-nineteenth century preoccupation with keeping government responsible to the people by having executive and judicial officers of state and local government directly elected. Thus, again, it can be seen that the reform of an early era has become a stumbling block in meeting organizational and operational needs of today.

The Changing Agenda of Reform: Fewer Dogmas

For those of us who are involved in organizations which help set the agenda of reform by publication of model constitutions, charters, and laws, it is a sobering thought to realize that some of our most cherished reform prescriptions may within a generation become an impediment rather than an aid to making government more responsible and responsive.

For example, the dogmatic civil service provision, an essential of the reform agenda of only a few years ago, was not endorsed in the latest edition of the *Model State Constitution*[35] as it was in the previous one.

Drastic changes in the provisions for state-local relations were labeled by some as a repudiation of "home rule," a fundamental part of the traditional reform creed. The new edition endorses a formula which encourages maximum initiative at both the state and local levels but recognizes that in the last analysis the broader interests of the state must take precedence.

The initiative and referendum are no longer considered as priority items of a reform program and are now included only as an appendix to the *Model State Constitution.*

Model-building is characterized by some of the same restraints as the actual

[35] National Municipal League, *Model State Constitution* (New York: National Municipal League, 1963).

process of constitutional revision. In both endeavors it is much more difficult to take something out of a constitution than it is to put something in. The obstacles presented by vested interests in existing constitutional language are not easily overcome. Today's reformers must be very sure to heed the words of the late Justice Benjamin Cardezo: "A constitution states, or ought to state, not rules for the passing hour, but principles for an expanding future."[36]

If we believe that states do have a significant role in an "expanding future," the direction of constitutional reform should be obvious. We must be wary of measures whose purpose is simply to correct abuses. Their potential for ultimate harm may outweigh their immediate benefits. Each reform measure must be judged as to whether or not it enhances the capacity of the state to act.

[36] Benjamin N. Cardezo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p. 24.

POLITICS AND CONSTITUTION-MAKING IN ILLINOIS

MILTON L. RAKOVE

Long before the 116 delegates, who were elected by a small percentage of the mostly disinterested sovereign voters of the State of Illinois, met in Springfield to write a new constitution for the state, they had already become the recipients of a great deal of well-meaning advice as to how they should conduct themselves in their deliberations.

The newly elected Founding Fathers of Illinois have been told to be vigorously virtuous, eminently above board, always open, conscientiously representative, completely nonpartisan, and above all totally nonpolitical. They have been advised that their sole concern should be the interests of all the people of Illinois without regard to local, sectional, regional, ethnic, racial, religious, or economic concerns. And they have been warned that the watchdogs of the public interest, the representatives of the mass media, would be hovering over their shoulders as they met in open convention, in the full glare of the public eye, ready to expose to a concerned electorate any violation of their public trust.

It should be said publicly, what most of the delegates must know privately, that most of this well-meaning advice should be discounted and ignored by the delegates if they have any hope of writing a constitution that has any chance of being adopted by the sovereign voters of the State of Illinois. If the Founding Fathers of this country — or their descendants down to the fifth generation — had followed such advice they would still be sitting in Independence Hall in Philadelphia, trying to write a workable constitution for the new republic they were founding. We can all be thankful that those Founding Fathers locked the doors and windows; posted a guard outside to keep busybodies away; and bargained, wheeled, dealed, and horsetraded with each other. In general, they conducted themselves as practical politicians who had to write a political document that could be accepted by, or at least put over on, a divided, selfish, and generally apathetic and uninformed populace.

The delegates in Springfield surely must recognize, too, that Illinois is not one state made up of a homogeneous mass of public-spirited, concerned citizens. Illinois is at least three states — the City of Chicago, the suburbs of Chicago ranging into some of the communities in Cook County's neighboring counties, and the rest of Illinois, Downstate.

Indeed, if one is to be realistic about the makeup of Illinois, the state is divided into much more than three separate parts. For the facts of life are that each of these separate parts of the state are fragmented into numerous subdivisions, divided along racial, ethnic, religious, economic, and political lines.

There is no such entity as the City of Chicago; neither is there an area called the suburbs, nor a subdivision of Illinois called Downstate, except in the most vague and general sense. The City of Chicago is a kaleidoscope of separate communities inhabited by diverse peoples ranging from the high-rise Gold Coast fringe along Lake Michigan, through the deteriorating neighborhoods, into the black belts of the inner city's West and South Sides, to the middle-class white neighborhoods of the Northwest and Southwest Sides. Chicago's suburbs encompass a spectrum of communities from Kenilworth to Hometown, with the Skokies, Park Forests, Streamwoods, Park Ridges, Glencoes, and Hazelcrests in between these two economic and social extremes. What is called "Downstate" ranges geographically from the towns on the Wisconsin border to the communities south of the Mason-Dixon line to the Tri-Cities on the Iowa border, and encompasses a social, cultural, and economic potpourri that includes the microcosm of Chicago that is East St. Louis, the southern town of Cairo, and the prosperous farm communities of central Illinois.

All of these peoples and all of these diverse communities have different interests, aspirations, and needs. The divergent interests of these groups sometimes coincide as members of the body politic of the State of Illinois, but they more often serve to divide and fragment the people of the state. A close look at the character of each of the three major subdivisions of the State of Illinois would document the social, cultural, and political differences that differentiate these three areas from each other.

Chicago

Chicago, with three and a half million people, about one-third of the population of the state, is Catholic, nationality-ethnic, and black.

Settled originally by the Catholic Irish and Germans; inundated by successive waves of Poles, Bohemians, Italians, Lithuanians, and Jews; and overwhelmed since 1940 by a massive migration of southern blacks; Chicago might have been a classic example of the melting pot that is America in the twentieth century.

It might have been an example, except for the fact that the cliché is not very relevant for Chicago. For in Chicago and its environs the "melting pot" has not "melted." The ethnic, racial, and religious divisions among the polyglot population of the city have remained fairly rigid and have perpetuated themselves into the second and third generations of the children of the original immigrants.

Chicago developed as a city of nationality neighborhoods and has remained so until this very day. The sons of the Irish tavern-owners, policemen, and firemen have segregated themselves from their Polish neighbors even as they moved up into the upper economic and social echelons of the practice of law and medicine. Their fathers remained aloof from the non-Irish immigrants, and the sons and daughters have separated themselves, not only from the East Europeans, but also from the Irish who have not made it in the new world. The Poles and Italians, the Bohemians and Lithuanians, and the Germans and the Jews have all maintained their social and cultural distances from each other. And all of these groups have maintained a rigid wall between themselves and the exploding black population and the less important Puerto Rican–Mexican elements of the city.

Politics in Chicago today remains, to a considerable extent, a bargaining process among the leaders of these fairly self-contained and self-directed ethnic communities. Chicagoans do not identify themselves with their city as an ancient Athenian would with his *polis,* an imperial Roman with his world capital, or even a modern Parisian, Londoner, Florentine, or Berliner with his community. Chicagoans think socially, culturally, economically, and, as a consequence, politically, in terms of their neighborhoods or the ethnic groups rather than in terms of their city.

The political leadership of the city is drawn from these ethnic, parochially oriented neighborhoods. Those political leaders reflect and represent the local prejudices, narrow outlooks, and indigenous aspirations of their home bases. The Anglo-Saxon, white Protestant, Western European, middle-class ethos and concept of government has little or no meaning to the lower-class, peasant-descended, East and South European, heavily Catholic population of the city. Good government means services, favors, and concessions on a local basis rather than fiscally conservative, nonpartisan, normally righteous, community-oriented, city-wide concern.

The influx of a million blacks into the city has fragmented the population even more deeply than the ethnic divisions. The division between two and a half million whites and one million blacks has added another dimension to the ethnically separated city. In one sense, it has unified the ethnic whites on a single political issue: blocking the movement of the blacks into white neighborhoods. But, at another level, the rapid growth of the black population and the steady spread of the black ghetto has opened a wide chasm within the city's body politic between the nonwhite and white populations of the city. Race has begun to replace nationality as the major factor in the politics of the city. And the blacks, even more than the ethnic whites, refuse to identify themselves socially, culturally, or politically on a communal basis with a city which keeps them penned in a ghetto and forces them into a separate but not equal life within the city.

A third factor in Chicago's politics is religion. In the largest Roman Catholic diocese in North America, no political decision can be made without due consideration for the feelings and aspirations of the majority Catholic population of the city. It is with good reason that the State of Illinois annually awards license plate Number 1, not to the Governor, but to the Roman Catholic Archbishop of Chicago. The influence of the hierarchy and the many parishioners of the Church of Rome is always present in decision-making in the politics, law, educational policy, and cultural life of the city.

This is not to say that that influence is necessarily bad or necessarily good — merely that it is so. Roman Catholic power in Chicago has contributed mightily to the growth and development of the city and to its problems. If, as Christ told his people, his Father's house has many rooms, so does his Roman Catholic Church in Chicago have many factions. Some of the most liberal as well as some of the most conservative proposals and pressures in the life of Chicago have emanated from the many-splendored, broad-based, variegated Roman Catholic clergy and laity of the city.

In contrast to the dominant Catholic religious community, the Protestant and Jewish communities, with the exception of powerful business leaders, are weak and ineffectual. This is not to say that they are ignored or are not consulted, but that their political influence is nowhere near so great as that of the Roman Catholic community. Since most of the Protestants in the city are now the blacks, they can be dealt with politically on the basis of race rather than religion. Since most of the Jews have fled the city for the suburbs, except for residence in a few fringe areas, they can be easily ignored, although recognized and tolerated in the political decision-making in the city.

To sum up, the politics of Chicago is affected most by three major factors — the nationality makeup of its white population, the race issue stimulated by the exploding black population, and the religious dominance of the city's life by the Roman Catholic leadership and population.

Suburbia

Chicago's suburbs, like the city, are also undergoing radical change. The black migration into Chicago has stimulated a massive exodus of white middle-class and working-class citizens. While the black population of the city doubled between 1950 and 1960 — going from 400,000 to 800,000 — the total population dropped 2 percent. In the same period, the population of the surburban area of Cook County increased by 71 percent.

The face of the surburban area of Cook County is being altered in two major ways. First, many new development suburbs have sprung up where farmers' fields once graced the landscape. Second, the old, established, close-in suburban cities and villages are undergoing a transformation.

Chicago's working-class and lower middle-class, ethnic, heavily Catholic,

white population is leaving the city for new tract-development suburbs. New, fairly homogeneous population centers are being established by the fleeing working class and lower middle-class white Democrats from the city.

Contrary to popular mythology, these fleeing Democrats are not becoming Republicans in their new communities. Isolated from surrounding established towns, in close proximity physically to other emigrant Democrats like themselves, and relatively untouched by established Republican-dominated suburban organizations, most of the former city Democrats are retaining their traditional affiliation with the Democratic Party nationally.

However, on local issues they have tended to become relatively nonpartisan, as homeowners and taxpayers without regard to any formal party affiliation or doctrine. Traditional Democratic New Deal liberalism or Republican hostility to welfare-state measures and governmental activity in a broad range of programs are both relatively meaningless to these new suburbanites. Their primary concerns are with administrative, not political, matters at the local level. Taxes, sanitation, flood control, schools, zoning, and property values occupy whatever time they have to devote to public affairs. Appeals to their civic-mindedness on an ideological basis fall on deaf ears. They are practical, pragmatic, self-centered, narrowly oriented and concerned, and nonideological politically insofar as local problems and issues are concerned. As for the city which they left, the county of which they are a part, the state which spawned them legally, and the nation which guides their ultimate destinies — those are matters of relatively little concern in comparison to their immediate local problems. Their major interests are to make sure that blacks do not follow them into their new communities, and to keep their taxes down even if it means unsatisfactory and inadequate local services and facilities.

These are not Jeffersonian New England town-meeting communities governed by Anglo-Saxon ideas of what the good society should be. They are, rather, first- and second-generation Eastern and Southern Europeans, influenced by their peasant and proletarian backgrounds and dominated by still-retained prejudices and fears of the strangers beyond the fence.

In contrast, the old established cities and villages of Chicago's suburban hinterland are undergoing a significant political transformation. These communities are attracting upper-middle-class city Democrats moving in search of good schools, safe streets, clean government, and all the other trappings of the middle-class American dream.

Most of these new suburbanites are the newly-arrived middle class in America. Their fathers were laborers, small businessmen, and skilled tradesmen. They are doctors, lawyers, teachers, corporations junior executives, and successful businessmen. Their wives are college graduates and their children are born to the upper middle class. The Catholics and Jews among

them have assimilated as much as possible the dominant Protestant middle-class values of white America, in the pattern described by Will Herberg in *Protestant, Catholic, Jew.* They have not left their faiths, but they have adapted socially, culturally, and often politically to what they believe are American traditions.

Unlike the city emigrants to the development suburbs, they have retained their Democratic liberalism, applied it to local community problems, and combined it with their new-found Anglo-Saxon Protestant concepts of conservative, antimachine, nonpartisan, well-run local government. They are hybrids, fusing the old with the new, the untried with the true, that which they are with that which they would like to be. They are Ortega y Gassett's revolting twentieth century masses who pursue culture, politics, recreation, and community life with a passion not seen in their newly discovered conservative communities for many years.

They have left the city behind, but most of them work there, have attachments there, and are concerned with its problems, unlike the old settlers in the new communities. They will probably never go back, but they think they will. In the meantime, they are in the process of urbanizing their new communities, even while they are adapting to them. They are a disturbing force in these old communities, partially adaptive, partially disruptive, accepting the values but challenging them at the same time. They are in the process of creating a new, more partisan politics in the once tranquil, administratively oriented, nonpartisan Republican-established suburbia of Chicago. They are Democrats who have half-adopted some of the better tenets of Republicanism and are forcing their neighbor Republicans to rethink and reevaluate their own party principles and their communal values.

These suburban communities are the opposite of the development suburbs, where politics is negligible and administration is all important. In the old suburban communities, nonpartisan administrative matters are becoming increasingly political and intertwined with county, state, and national political directions and ideologies.

Downstate

Illinois, like many other American states, has traditionally been divided between a major industrial city and a rural hinterland. Like most other such American states, the marriage of the two parts has not been a union of compatible partners, but rather a shotgun wedding of contending parties.

In contrast to Catholic, ethnic, black Chicago, Downstate has traditionally been white, Protestant, small-town, Republican, and conservative. It is the land of the Lions, the home of the Kiwanis, the territory of the Elks. The sanctity and validity of traditional white, Protestant, conservative rural America guides the outlook and the aspirations of the majority of its population, except for a few industrialized small cities.

The state government at Springfield has been the private province of this part of Illinois. Chicago, the colossus of the North, with its blacks, Catholics, Jews, crime, delinquency, and corruption, has always been regarded as the Babylon of Illinois, a place to visit but not to live. In truth, there has usually been as much crime, delinquency, and corruption proportionately in the towns of downstate Illinois as in Chicago, but this fact has been conveniently overlooked by the local citizenry.

Castigating the Northern colossus has been a way of life for generations in rural Illinois. Protecting the state government from undue influence by the big city slickers has been a self-appointed holy mission. Exploiting the urban masses financially and politically in the interests of the rural section of the state has been regarded as proper. If this differentiation violated the state constitution, deprived Chicago's citizens of a fair share of the state's revenues, discriminated against Chicago's children in providing equal educational opportunity, and denied equal representation or consideration for their interests to Chicago's population, it was all being done in the name of the sanctity of the real American values which happened to coincide with the interests of the economic and political leadership of the downstate areas.

The major problem in this struggle has been a steady growth of population and political and economic power in Cook County, in Chicago, and in its suburban ring. Cook County, with over 5 million people, has a population equal to all the other 101 counties and a disproportionate share of the industry and wealth. Keeping some balance in the state's politics and economics against the growing power of the giant northern county is, of necessity, a major political consideration. The success with which downstate Illinois has accomplished this task is a testament to the tenacity, ingenuity, and dedication of downstate Illinois' political leadership.

Downstate Illinois has many problems of its own, some similar to those in Cook County and many different. Saving the towns from deterioration, keeping industry from leaving, bringing in new industry, offering young people adequate opportunity at home, trying to compete culturally with the big urban area, and maintaining and protecting a way of life and traditional values are of major concern to the residents of downstate Illinois. Like their northern counterparts in Chicago, downstate politicians not only represent but also reflect the aspirations, needs, and values of their constituents. Like their big-city counterparts, their behavior and policies are based on a mixture of self-interest and honest belief in the value of what they defend. And who is to say that they are not partially correct in what they do, that what they strive to maintain is not in the best interests of their constituents and of the state?

Conclusion

We live, in the state of Illinois, in a political community of over 10 million heterogeneous people, organized in racial, religious, ethnic, economic, and po-

litical groups. These groups have conflicting needs, aspirations, and interests, and compete with each other for the benefits and rewards that the state has to disperse. The delegates to the Constitutional Convention must take this basic fact into account in their attempt to write for the state a new constitution, which must be submitted to these voters for their approval.

This is not to say that Catholic voters in Illinois will approve or reject a new constitution solely on the basis of the article dealing with state aid to private schools, or that blacks will vote only about civil rights, or that Chicagoans will vote only about home rule, or that suburbanites will vote only about local governmental administrative provisions, or that property owners will vote only on the basis of the new revenue article. But it is a fact of political life that voters act politically primarily on the basis of their self-interests, not on the basis of the public good.

It is the primary task of good politics to reconcile the divergent interests of contending groups in a political community. If the delegates to the Constitutional Convention want to succeed in their task for formulating a new constitution for Illinois, they had better be good politicians first, and legal draftsmen second. For a good constitution should be primarily a political charter, and only secondarily a legal document. Indeed, as the classical philosophers well understood, a good constitution should be even more than a political and legal document, and should sketch out in broad strokes the basic ethos of the totality of the political, economic, social, spiritual, and intellectual foundations of the community.

This task is not an easy one for even the most experienced and skillful constitution-makers. For they must not only balance off the demands of the diverse interest groups in the community, but they must also weigh those partisan demands against an overriding concern for the public interest of the whole community. To do that well requires the ultimate in political skills and abilities.

A school of thought prevalent in Illinois today argues that the constitution-makers in Springfield should abjure politics in their deliberations. To follow such advice would be the height of folly, and would insure defeat at the polls for any document the delegates produce. They should rather become skilled practitioners of politics, employ all of its most useful tools, and engage in all of its traditional practices. They should compromise, bargain, wheel and deal, and meet in lots of closed, smoke-filled rooms where they should conduct the real business of the Constitutional Convention.

After all, that is what the Founding Fathers did at Philadelphia in 1787. They were, in essence, a group of practical politicians who wrote a political document which has served this nation well for almost 200 years. The 116 delegates meeting in Springfield could well take a leaf out of that book in the next few months.

SPEAKERS

SPEAKERS

George D. Braden is an attorney for the General Electric Company, New York City, and coauthor with Rubin G. Cohn of *The Illinois Constitution: An Annotated and Comparative Analysis.*

William N. Cassella, Jr., is executive director of the National Municipal League, New York City.

Jefferson B. Fordham is dean of the Law School at the University of Pennsylvania, Philadelphia.

Milton L. Rakove is a professor in the Department of Political Science, University of Illinois at Chicago Circle.